UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

IN RE CHARGE OF JUAN CARLOS CUNI BARO	)	
UNITED STATES OF AMERICA, Complainant,	)	8 U.S.C. § 1324b Proceeding
V.	)	OCAHO Case No. 95B00118
HYATT REGENCY LAKE TAHOE, Respondent.	)	Judge Robert L. Barton, Jr.

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION AS TO COUNT ONE OF THE COMPLAINT
(May 16, 1996)

I. PROCEDURAL BACKGROUND

On August 5, 1995, the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) filed a two-count complaint in the Office of the Chief Administrative Hearing Officer (OCAHO). Count one of the complaint alleges that Hyatt Regency Lake Tahoe (Hyatt or Respondent) requested from Juan Carlos Cuni Baro[1] (Baro) a document issued by the Immigration and Naturalization Service (INS) to establish work eligibility under 8 U.S.C. § 1324a(b) and that this constitutes a request for more or different documents than required to show employment eligibility in violation of the document abuse provisions of Section 274b(a)(6) of the Immigration and Nationality Act (INA), as codified at 8 U.S.C. § 1324b(a)(6). Count two of the complaint alleges that Hyatt maintained a pattern or practice of requesting more or different documents than are required for employment eligibility verification requirements and that such a pattern or practice constitutes an unfair immigration related employment practice in violation of 8 U.S.C. § 1324b(a)(6).

[1] Baro, as the individual filing a charge with OSC based upon which the complaint here was filed, is a party in this case pursuant to 28 C.F.R. § 68.2(f).

The complaint was filed based on an intake questionnaire filed by Baro with the Nevada Equal Rights Commission (NERC) on April 1, 1994. The intake questionnaire alleged that Baro was discriminated against by being laid off due to his national origin, race and color. The specific discriminatory conduct alleged was described in the intake form as consisting of Hyatt stating that Baro did not have "the right immigration paper." Intake Form ¶ 2. Pursuant to a work sharing agreement with the Equal Employment Opportunity Commission (EEOC), NERC referred Baro's charge to EEOC. On December 30, 1994, EEOC referred the portions of the charge relating to alleged violations of the document abuse provisions of IRCA to OSC pursuant to a Memorandum of Understanding between the agencies; OSC received such referral on January 6, 1995. Complaint ¶ 18.

On September 14, 1995, Respondent filed its answer by which it denies the substantive allegations of the two counts of the complaint, denies that the complainants are entitled to any relief, denies that OCAHO has jurisdiction over this matter, and asserts multiple affirmative defenses. Answer ¶¶ 4, 22-36. The asserted affirmative defenses include: that there is insufficient evidence to prove that Baro is entitled to the protections of IRCA; that Baro was not discharged from employment, but was laid off due to lack of work in his department and inferior performance; that OCAHO and OSC lack jurisdiction because the charge is untimely; that Baro did not adequately and fully complete Section 1 of his Employment Eligibility Verification Form (I-9 form) and therefore could not prove his work authorization; and that Respondent had the obligation under the INA to not continue to employ individuals who cannot fully and honestly complete Section 1 of the I-9 form. Answer ¶¶ 29-36.

On December 1, 1995, Respondent filed a motion for partial summary judgment[2] (R. 1st MSJ) and a concurrent motion to stay discovery. Respondent, by these motions, sought summary decision as to count one of the complaint, and for an immediate order staying discovery pending resolution of the summary decision issues. Respondent specifically asserts that it is entitled to summary decision because:

> (1) Baro is precluded from asserting a claim under the INA because he has not had authorization to work in the United States at any time relevant to this action; (2) Baro is precluded from asserting a claim under the INA because he is not a member of one of the five categories of immigrants protected by 8 U.S.C. § 1324b.

R. 1st MSJ at 2.

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[2] While Respondent's motions request the Court to enter "summary judgment" in its favor, the applicable Rules of Practice and Procedure at 28 C.F.R. § 68.38 provide for the entry of "summary decision." Pursuant to this Rule, in adjudicating the motions I will refer to them as motions for summary decision.

On December 4, 1995, a telephonic prehearing conference was held during which argument was heard on Respondent's motion to stay discovery. The motion for stay was granted in part, with certain previously scheduled depositions and requests for production being allowed during the pendency of the stay.

On December 6, 1995, Respondent filed a revised motion for summary decision as to count one. The only revision made to the motion was the renumbering of exhibits, pursuant to the Court's directions.

On December 12, 1995, Respondent filed a motion for summary decision regarding count two. Specifically, that motion asserts that OSC is not empowered to prosecute pattern or practice cases brought pursuant to 8 U.S.C. §1324b.

On January 11, 1996, Respondent's third motion for summary decision (R. 3d MSJ), dated December 20, 1995, was received by the Court. Respondent argues, by this motion, that the complaint is untimely and that it is therefore entitled to summary decision in its favor.

On January 23, 1996, OSC filed its memorandum of points and authorities in opposition to Respondent's motions (C. Memo). OSC states that summary decision is inappropriate here because there is a genuine issue of material fact as to Baro's status at the time of the alleged document abuse. C. Memo at 3. OSC also asserts that questions regarding who is protected from document abuse, OSC's authority to prosecute pattern or practice cases, and the timeliness of the charge and complaint, are legal issues which should be decided in OSC's favor.

On January 30, 1996, Respondent filed a motion for a right to reply to OSC's opposition and for oral argument of the motions for summary decision. On February 1, 1996, OSC opposed the request to file a reply brief because the briefs before the court set out the relevant arguments and case law sufficiently.

On February 6, 1996, I issued an Order which granted Respondent's motion for a right to file a reply brief. On February 21, 1996, Respondent filed its reply brief. Subsequent to Respondent's filing its reply brief, OSC filed a motion on February 22, 1996, seeking a right to reply to said reply brief, which was granted. On April 1, 1996, OSC filed its reply brief opposing the motions for summary decision.

On April 10, 1996, I issued a Notice of Prehearing Conference regarding a previously arranged April 25, 1996 telephonic conference during which I would hear oral argument on Respondent's pending motions for summary decision. On April 23, 1996, Respondent's counsel informed me that she would appear in person for the oral argument. Following such notice, I issued an Amended Notice of Prehearing Conference stating that the oral argument will take place in person in the Executive Office for Immigration Review hearing room on April 25, 1996.

On April 24, 1996, Ian E. Silverberg, Esquire, filed by facsimile a notice of appearance as counsel for Baro. On April 25, 1996, Mr. Silverberg filed by facsimile a letter stating that he had no objection to the oral argument scheduled for April 25, 1996 proceeding without his participation.

On April 25, 1996, I presided over the previously arranged prehearing conference, and heard oral argument on Respondent's motions for summary decision. During the oral argument, I stated that I may rule on the separate motions under separate orders. Accordingly, this Order only addresses Respondent's first motion which seeks summary decision as to count one of the complaint. Respondent's motions for summary decision regarding count two will be addressed in a separate order.

II. STANDARDS FOR SUMMARY DECISION

OCAHO Rules of Practice and Procedure authorize the ALJ to "enter summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 28 C.F.R. § 68.38(c). A fact is material if it might affect the outcome of the case. Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986). In demonstrating that there is an absence of evidence to support the non-moving party's case, the movant bears the initial burden of proof.

In determining whether the movant has met its burden of proof, all evidence and inferences to be drawn therefrom are to be viewed in a light most favorable to the non-moving party. Matsushita Elec. Indus. Corp. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). The moving party satisfies its burden of proof by showing that there is an absence of evidence to support the non-moving party's case. United States v. Davis Nursery, Inc., 4 OCAHO 694, at 8 (1994) *citing* Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). The burden of production then shifts to the non-moving party to set forth specific facts showing that there is a genuine issue for trial. Id. Failure to meet this burden invites summary decision in the moving party's favor.

III. FINDINGS OF FACT FOR RULING ON SUMMARY DECISION REGARDING COUNT ONE

As all facts must be viewed in the light most favorable to the non-moving party in adjudicating a motion for summary decision, the following findings of fact are only for the purpose of ruling on the motion for summary decision as to count one, and are either facts not in dispute between the parties or, where facts are in dispute, those alleged by the Complainants.

The parties' filings demonstrate that there is no dispute as to the following facts, and, therefore, there can be no genuine issue as to such facts for trial. Baro was paroled into the United States as a part of the Mariel boat lift. C. Memo at 7; R. 1st MSJ at 5. Baro was given work authorization pursuant to the President granting an extension of parole to Cubans who entered the

United States between April 21 and June 19, 1980 and INS policy,[3] which instituted this extension by extending parole to such individuals until January 15, 1981, and that such extension included work authorization. C. Memo at 8; R. 1st MSJ at 5. Such work authorization was granted until January 15, 1981, at which time the individuals' status was reviewable by the INS. Id.[4] Baro was employed by Hyatt from August 30, 1991 until November 19, 1993. The parties agree that Baro did not have any contact with the INS from 1981 until November 18, 1993, when he applied to adjust his status. C. Reply Brief at 3; R. 1st MSJ at 5. It is also undisputed that at all times relevant to this action, including the period when Baro was employed by Hyatt, Baro did not have INS issued documentation of work authorized status. C. Reply Brief at 3; R. 1st MSJ at 5.

IV. APPLICABLE STATUTORY AND REGULATORY AUTHORITY

Count one alleges that Respondent violated the document abuse provisions of IRCA. These provisions, at 8 U.S.C. § 1324b(a)(6), provide:

> For purposes of paragraph (1), a person's or other entity's request, for satisfying the requirements of section 1324a(b) of this title,[5] for more or different documents than are required under such section or refusing to honor documents tendered that on their face reasonably appear to be genuine shall be treated as an unfair immigration-related employment practice relating to the hiring of individuals.

OSC asserts that Baro is work authorized incident to his status as an individual paroled into the United States. C. Reply Brief at 3. OSC states that Baro maintained work authorization pursuant to 8 C.F.R. § 274a.12(a)(4), which is entitled "Classes of aliens authorized to accept employment." 8 C.F.R. 274a.12. Section 274a.12(a) provides, in pertinent part, that:

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[3] See INS Telegraphic Message CO 242.1-P (July 3, 1980), *reprinted in* 57 Interpreter Releases 333 (1980).

[4] The parties only agree that Baro's work authorization extended to January 15, 1981. Respondent asserts that Baro was then required to apply to the INS to change his status in order to maintain work eligibility. R. 1st MSJ at 5. OSC contends that Baro was work authorized "incident to his status as an individual who was paroled into the United States as a refugee, pursuant to 8 C.F.R. § 274a.12(a)(4)." C. Reply Brief at 3.

[5] Title 8 U.S.C. § 1324a(b) contains IRCA's employment verification system, applicable to a "person or other entity hiring, recruiting, or referring an individual for employment in the United States." 8 U.S.C. § 1324a(b). These requirements include the examination and attestation of such examination by the pending employer of documents establishing employment authorization and identity. 8 U.S.C. § 1324a(b)(1)(A). Acceptable documents for establishing work authorization and/or identity are listed at 8 U.S.C. §§ 1324a(b)(1)(B), (C) and (D). Also required in the verification system is an attestation by the putative employee and retention of the documents by the employer for a period of time. See 8 U.S.C. §§ 1324a(b)(2) and (3).

> Any alien who is within a class of aliens described in paragraphs (a)(3) through (a)(8) or (a)(10) through (a)(13) who seeks to be employed in the United States, must apply to the Service [INS] for a document evidencing such employment authorization.

Section 274a.12(a)(4) designates as work authorized:

> An alien paroled into the United States as a refugee for the period of time in that status, as evidenced by an employment authorization document issued by the Service.

V. MOTION FOR SUMMARY DECISION FOR COUNT ONE ADJUDGED

The parties agree, and the pertinent OCAHO case law holds that, at the very least, an individual must be authorized for employment in the United States in order to maintain a claim of document abuse. See, e.g., United States v. Strano Farms, 5 OCAHO 748, at 10, 15 (1995); Huesca v. Rojas Bakery, 4 OCAHO 654, at 12 (1994); United States v. Guardsmark, Inc., 3 OCAHO 572, at 15 (1993). OSC asserts that Baro was work authorized incident to his status at all time relevant to this action, pursuant to 8 C.F.R. § 274a.12(a)(4). Section 274a.12(a) requires that for an alien to be authorized for employment incident to his status he must apply to INS for a document evidencing such employment authorization. 8 C.F.R. § 274a.12(a). Furthermore, 8 C.F.R. § 274a.12(a)(4) specifies that in the case of an alien paroled into the United States, during the period of time in that status such individual is authorized for employment incident to status only "as evidenced by an employment authorization document issued by [INS]."

It is undisputed that prior to and during his employment by Respondent, Baro did not apply to INS for documentation evidencing his work authorization. Further, OSC admits that Baro did not have any such INS issued proof of employment authorization. C. Reply Brief at 3.

On brief and at oral argument, OSC argued that Baro was work authorized incident to his status despite the fact that he had not applied to INS for documentation. C. Reply Brief at 3. OSC also references the Cuban Refugee Adjustment Act of 1966, Pub. L. 89-732 as amended (Cuban Refugee Act) and the INS statement in 1984 that Cubans who came to the United States in 1980 as part of the Mariel boat lift are eligible to apply for adjustment of status to that of permanent resident under such Act. C. Memo at 9. The Cuban Refugee Act provides, in pertinent part:

> That, notwithstanding the provisions of section 245(c) of the [INA] the status of any alien who is a native or citizen of Cuba and who has been inspected and admitted or paroled into the United States subsequent to January 1, 1959 and has been physically present in the United States for at least one year, may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence **if the alien makes the application for such adjustment**, and the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence. **Upon approval of such an application for adjustment of status**, the Attorney General shall create

> a record of the alien's admission for permanent residence as of a date thirty months prior to the filing of such an application or the date of his last arrival into the United States, whichever is later.

8 U.S.C. § 1255 note, Pub. L. 89-732 (November 2, 1966), as amended [emphasis added].

OSC argues that despite the fact that Baro did not have any contact with INS after 1981 until he first applied for permanent residence on November 18, 1993, that as a Cuban citizen who arrived in the United States between April 1, 1980 and June 19, 1980 and remained physically present in the United States for at least one year, he is entitled to adjust his status under the Cuban Refugee Act. C. Memo at 10. OSC further asserts on brief that upon adjustment of his status and pursuant to the Cuban Refugee Act, Baro "will be a permanent resident as of 30 months prior to when he applied, on November 18, 1993, or as of May, 1991, before he was ever employed by Respondent." Id. [emphasis in original]. OSC also asserts that Baro was issued an Employment Authorization Document on November 23, 1993, after his dismissal from Hyatt on November 19, 1993. However, OSC conceded at oral argument that the 30 month retroactive permanent resident status afforded by the Cuban Refugee Act could not be used here to deem Baro a permanent resident as of the time he began his employment with Hyatt and thereby hold Hyatt liable for document abuse under 8 U.S.C. § 1324b(a)(6).

OSC's argument is flawed in two respects. Initially, a Cuban refugee who entered the United States between April 1, 1980 and June 19, 1980 is not entitled to adjustment of status. Rather, the Cuban Refugee Act states that upon application by the individual the Attorney General has the discretion to adjust such person's status to that of permanent resident. 8 U.S.C. § 1255 note, Pub. L. 89-732 (November 2, 1966), as amended. Accordingly, adjustment of status requires the individual to take the step of filing such an application. Here it is undisputed that Baro did not take that step until November 19, 1993, over thirteen years after coming to the United States and over nine years after the INS conceded the applicability of the Cuban Refugee Act to the Cubans who came to the United States via the Mariel boat lift. Secondly, as Baro did not apply for and receive his change of status until after he was laid off from Hyatt, and OSC conceded that such change of status cannot be retroactively applied to hold an employer liable for document abuse, the entire argument regarding his receipt of an INS issued employment eligibility document is irrelevant to these proceedings.

Examining the facts in the light most favorable to OSC and Baro, it is evident that there is no genuine issue of material fact as to count one of the complaint. OSC admits that Baro was paroled into the United States as a refugee as a part of the Mariel boat lift and that he did not apply to the INS to alter his status to that of permanent resident until after his dismissal from Hyatt. Baro has filed nothing to dispute this statement of his status. Baro's attorney, who filed his notice of appearance following the filing of all three of Respondent's motions for summary judgment, and who waived his right to participate in the oral argument on the motions, also has made no filing with respect to Baro's status.

In order to accept employment in the United States incident to his status as a parolee, Baro was required to apply to and receive from the INS documentation of his work authorization. 8 C.F.R. § 274a.12(a)(4). During the period of time he was employed at Hyatt, from August 30, 1991 until November 19, 1993, it is undisputed that Baro had not applied to the INS nor had he received any document evidencing his work authorization. According to 8 C.F.R. § 274a.12(a)(4), application to the INS and receipt of such documentation is required for an alien authorized to accept employment incident to their status of an alien paroled into the United States as a refugee for the period of time in that status. As Baro sat on his rights to apply for adjustment of status for at least nine years (after INS clarified the applicability of the Cuban Refugee Act to Mariel Cubans), his status remained that of an alien paroled into the United States as a refugee during his employment with Hyatt. Therefore, as he lacked INS issued documentation evidencing his work authorization, he was not eligible to accept employment in the United States, and also was not eligible for the document abuse protections of IRCA at 8 U.S.C. § 1324b(a)(6).

As there is no genuine issue as to any material fact regarding the document abuse allegations of count one, and as Respondent is entitled to judgment as a matter of law on this count, I grant Respondent's motion for summary decision as to count one.

VI. ADDITIONAL ARGUMENTS

As I have found that Baro is not protected by the document abuse provisions of IRCA, I find that it is unnecessary to adjudicate the additional points made by Respondent in seeking summary decision for count one.

However, with respect to the timeliness issue raised by Respondent, I note that OSC did not comply with the requirements of 8 U.S.C. § 1324b(d)(1). This section requires that "[t]he Special Counsel shall investigate each charge received and, within 120 days of the date of the receipt of the charge, determine whether or not there is reasonable cause to believe that the charge is true and whether or not to bring a complaint with respect to the charge before an administrative law judge." 8 U.S.C. § 1324b(d)(1) [emphasis added]. The statute provides at Section 1324b(d)(2) that OSC has an initial 90 days following this 120 day determination to continue to investigate the charge and file a complaint with an ALJ. 8 U.S.C. § 1324b(d)(2). In its May 8, 1995 letter to Respondent regarding Baro's discrimination charge, OSC stated that it "has not made a determination as to the allegations of unfair immigration-related employment practices against Hyatt Regency Lake Tahoe." R. 3d MSJ, Ex. 7. The letter went on to state that Baro was free to file a complaint directly with an administrative law judge and that OSC also may still file a complaint before the expiration of the 90-day period. In addition, in its May 8, 1995 letter to Baro regarding his charge, OSC stated that it "has not made a determination as to your allegations of unfair immigration-related employment practices against Hyatt Regency Lake Tahoe."[6] The wording of the May 8, 1995 letters demonstrate

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[6] OSC served this letter on April 29, 1996, following the April 25, 1996 conference, pursuant to the Court's request.

that OSC did not comply with the requirements of the statute to make a determination as of 120 days after the filing of a charge as to whether or not there was reasonable cause to believe that the charge was true and whether or not to bring a complaint with respect to the charge before an administrative law judge.

Respondent notes that OSC admitted on May 8, 1995 in its right to sue letter that it had not made a determination as to the allegations of unfair employment related practices made against Hyatt by Mr. Baro. Respondent maintains that OSC's continuing right to file a complaint up to 90 days after the expiration of the 120 day exclusive investigatory period necessarily presumes that OSC fulfilled its mandatory obligation to make a reasonable cause determination within the initial investigatory period. Respondent contends that OSC has no right to file a complaint in the following 90 day period where it deliberately disobeys the statutory mandate to reach a reasonable cause determination within the first 120 days. R. Reply Brief at 16.

A federal agency is not permitted to ignore statutory mandates. Federal agencies, whether created by statute or Executive Order, are free to give reasonable scope to the terms conferring their authority, but they are not free to ignore plain limitations on such authority. Peters v. Hobby, 349 U.S. 331, 345 (1955). If OSC believes that the statute is flawed, it can seek remedial action by legislative amendment. Moreover, the current statute does not create an impossible burden for OSC, even in situations where an investigation is stalled by a respondent's lack of cooperation. Even if a party under investigation "stonewalls" or delays the investigation, OSC can comply with the statute by issuing a determination letter in which it states that at that time it has determined that there is not reasonable cause to believe the charge is true, that OSC is not bringing a complaint at that time, but that the investigation is not concluded and will continue during the following 90 day period of time.

Section 1324(d)(1) employs mandatory language with respect to OSC's investigation of charges. It states in pertinent part that "[t]he Special Counsel shall investigate each charge" and within 120 days of the date of the charge "determine whether or not there is reasonable cause to believe that the charge is true and whether or not to bring a complaint with respect to the charge before an administrative law judge." In this case OSC clearly did not comply with the statute. However, since I have ruled for Respondent on other grounds, I do not need to reach the question as to whether a complaint filed by OSC should be banned where it fails to comply with the statutory reasonable cause determination.[7] Nevertheless, OSC would be well advised to comply with the statutory language in the future, or it may jeopardize any complaint brought during the 90 day period of time provided in Section 1324b(d)(2).

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[7] The statute provides that the Special Counsel's failure to file a complaint in the 120 day period shall not affect the Special Counsel's right to investigate the charge or to bring a complaint during such 90 day period. However, the statute is silent as to the impact if the Special Counsel fails to make the reasonable cause determination required by Section 1324b(d)(1).

VII. CONCLUSION

For the reasons expressed above, Respondent's motion for summary decision on count one is granted. A ruling on Respondent's motions for summary decision as to count two, the allegation that Hyatt engaged in a pattern or practice of document abuse, will be made under separate order.

ROBERT L. BARTON, JR.
ADMINISTRATIVE LAW JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of May 1996, I have served copies of the foregoing Order Granting Respondent's First Motion for Summary Decision as to Count One of the Complaint to the following persons at the addresses shown:

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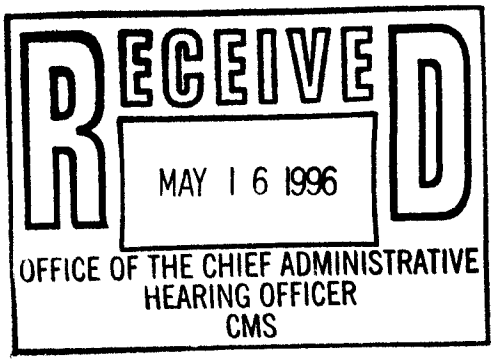

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